Supreme Court of the United States

OCTOBER TERM, 1963.

No. 79.

2,872.88 ACRES OF LAND, ETC., ET AL.,
Petitioners,

versus

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONERS.

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1. INTEGRITY OF FEDERAL RULES OF CIVIL PROCEDURE IS AT STAKE IN THIS CASE.

It ought not to have to be stated that the Federal Rules of Civil Procedure are applicable to all litigants, including the Respondent in this case, and to all intermediate appellate courts. These rules must not be decimated by a strained construction by a lower appellate court, or by the indifferent disregard of all authorities as is exhibited by the argument contained in the Brief for the United States in this case. We sub-

mit that the significance of the grant of certiorari is not in whether the judgment is affirmed or reversed, but instead lies in the eroding, if not disintegrating, effect which the opinion of the Fifth Circuit has upon the Federal Rules of Civil Procedure and their uniform interpretation and application. We submit that just such events led this Court in *U. S. v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, to state:

> "Fact that triers of fact totally reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions.
>
> "Federal rule providing that findings of fact shall not be set aside unless clearly erroneous applies to appeals by the government as well as to those by other litigants. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A.
>
> "Where evidence would support a conclusion either way, but trial court has decided to weigh it more heavily for defendants, such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous'. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A."
>
> *Id. 177 (1) (2) (4).*

In the opinion, it was stated:

> "The Government suggests that the opinion of the trial court 'seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the Court.' We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts.

But we are unable to discover the slightest justification for the accusation that it did so 'uncritically.' Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it 'ignored' them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.

"Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said, 'We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the triers of fact. * * *' National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 659, 69 S. Ct. 1283, 1285.

"Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., provides among other things: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

Id. at 178, 179.

What was there stated might well have been written in response to the Respondent's argument in this case.

2. RESPONDENT'S UNCONSCIONABLE REQUEST THAT NEW TRIALS BE GRANTED EMPHASIZES THE LACK OF EQUITY IN ITS POSITION THAT SPECIFIC OBJECTIONS TO PARTICULAR INADEQUACIES IN A MASTER'S REPORT ARE NOT REQUIRED UNDER RULE 53.

Respondent seeks to intimate that the Commissioners might not still be available. Such is unworthy of consideration. The facts are that they are available as of this writing, and this information is known or readily available to Respondent.

Respondents' criticism of the Commissioners' memory is as unfounded as its criticism of their reports. The fact is that a transcript of the entire evidence is available to the Commissioners if the case should be remanded. Respondent's position in this respect is more contrary to reason than the appellate court's opinion which it seeks to uphold. Respondent would set aside a solemn judgment on the erroneous supposition that the Commissioners' memory is faulty. It requests this result at the hands of this Court when it utterly failed to pinpoint any specific inadequacy in the reports when it had the opportunity and at the time when it was required so to do under Rule 53 on appeal to the District Judge. There will never be an end to litigation before a Master if a party may wait until after it has taken its chance on the trial court adopting or rejecting an award before it seeks to point out particular inadequacies in a Master's report. We repeat, if Respondent's position and the decision of the Fifth Circuit is correct, then Rule 53, for all practical purposes, has been effectually destroyed by indirection.

3. RESPONDENT'S ADMISSION THAT IT CANNOT PINPOINT ERROR IN THE COMMISSIONER'S REPORT IS CLEAR ADMISSION THAT THE DECISION OF THE FIFTH CIRCUIT IS WRONG.

Respondent says on page 11 of its brief that "it is impossible to pinpoint the error in the commission's award" since the report did not state on whose testimony the Commission relied. The argument then asks this Court to *suppose* that the Commission gave credence to lay witnesses because the awards exceeded the testimony of the landowner's experts.

On page 10 of its Brief, Respondent states that the Commission rendered an award of approximately $94.00 per acre for the Lindsey tract. This obviously is erroneous. The fee acreage taken was 963 acres and the award for this land was $96,300.00. (R. 32, 39.)

The admission by Respondent that it cannot pinpoint an error is an admission that the decision of the Fifth Circuit is wrong. Heretofore, in order to show reversible error, it was necessary to show not a mere *supposition*, suspicion, or possibility of error, but a clearly erroneous ruling that substantially prejudiced the appellant's legal rights. This was not done in the instant case.

(a) FACTFINDER IS NOT BOUND BY VALUE EXPERTS.

That the awards in the instant cases exceeded the opinion of testimony of the landowners' so-called experts, to use this Court's language, impeaches neither their impartiality nor their propriety. A factfinder is not bound to follow the expert, nor any other opinion, for that matter, and opinion evidence is not evidence of fact.

> "Opinions of experts as to value of gas leases are, at most, of evidential value and not of such conclusive force that refusal to follow them constitutes error, whether such evidence is addressed to a jury, judge, or statutory board."
>
> *Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 (6), 64 S. Ct. 724, at 729 and authorities there cited.*

To same effect:

Phillips v. U. S. (2nd Cir., 1945) 148 F. 2d 714 (4) (6) (11);

United States v. Honolulu Foundation (9th Cir., 1950) 182 F. 2d 172 (9) (10);

Stephens v. U. S. (5th Cir., 1956) 235 F. 2d 467, 468;

Anderson v. Anderson, 27 Ga. App. 513, 514, 108 SE 907;

Welch v. Tennessee Valley Authority (6th Cir., 1939) 108 F. 2d 95, 101;

Wooley v. Great A & P Tea Co. (3rd Cir., 1960) 281 F. 2d 78 (3).

"The comparative value of opinion evidence and non-expert witnesses is for the jury."

Fisher Motor Car Co. v. Seymour & Allen, 9 Ga. App. 465 (3) 71 SE 764.

"On hearing objections or exceptions to the report of commissioners or viewers, the report is not only viewed with as much favor as the verdict of a jury, that is, it is sustained until it is shown to be wrong in a point of law or a matter of fact, but is regarded with even greater respect. It is entitled to great weight with the trial court especially on mere questions of value."

29 C.J.S., p. 1352, § 317 (a).

It is noteworthy that the trial judge instructed the Commission that it was not bound by the opinion of any witness, to which instruction Respondent made no exception (R. 24).

4. RULES 52 AND 53 CONTEMPLATE THAT THE COURT OF APPEALS REVIEWS THE DISTRICT JUDGE, NOT THE COMMISSION. THE DECISION OF THE FIFTH CIRCUIT IGNORES THIS PRINCIPLE AND ATTEMPTS TO ENGAGE IN FACT-FINDING DE NOVO.

On pages 9-10, Respondent argues that only by knowing how the Commissioners resolved conflicts in the evidence can a Court of Appeals meaningfully examine the awards and determine whether they were clearly erroneous. It then argues in footnote 2 of page 10 that it agrees with Judge Tuttle's dissent in *U. S. v. Twin City Power Co. of Georgia*, 253 F. 2d 197, 205, to the

effect that the Court of Appeals reviews the Commission's award itself and not the action of the District Judge in adopting or rejecting the award. This dissent essentially emanates from the mistaken concept that the Court of Appeals can disregard what the District Court did, and determine for itself de novo whether the Commission's findings were clearly erroneous. In that case the District Judge had rejected the Commission's findings. In the instant case the District Judge has adopted the awards. The dissent in that case, and the opinion in the present case, though in words recognizing the true rule of review, actually disregards the action of the District Judge, and would assume the role of the District Judge anew in reviewing the case. The opinion of the Fifth Circuit is an attempt to engage in factfinding de novo This is plainly contrary to the express language of Rules 52 and 53.

Rule 53 contemplates the Master as an arm of the District Court. Only *"if required"* by the order of reference is it mandatory that the Master make findings of fact and conclusions of law. Only if the order of reference articulates the particular subjects on which findings are to be made can it be reasonably argued that the Master is required to make findings on specific facts. The order of reference in the instant case does not do so. There were no exceptions to the order of reference nor the instructions to the Commission. (R. 21.) Rule 53 (e) (2) then provides that the District Court after hearing may adopt the report, or modify it, or reject it in whole or in part, or receive further evidence, or recommit the case with instruc-

tions. This constitutes the first review of the case, because Rule 53 requires the Court to accept the Master's findings unless clearly erroneous. Rule 52 (a) then states that the Master's findings "to the extent that the Court adopts them, shall be considered as the findings of the Court". The adequacy of the findings for purposes of this review is "for the trial court to determine in the first instance in the light of the circumstances of the particular case". *Kelley v. Everglades Drainage District*, 319 U.S. 415, 422, 63 S. Ct. 1141, 1145. Only if the trial judge has abused his discretion in this respect are cases to be remanded for additional findings of fact.

The rules clearly contemplate a review of the action of the District Judge and not the Commission's awards because it expressly provides that the Master's findings, if adopted, shall become the findings of the District Court. This is the plain import of the Rules and the basis of the holdings in *U. S. v. Twin City Power Company*, (4th Cir., 1957) 257 F. 2d 108 (2), *U. S. v. Twin City Power Company*, (5th Cir., 1958) 253 F. 2d 197 (4), *Parks v. U. S.*, (5th Cir., 1961) 293 F. 2d 482 (2), *U. S. v. Tampa Bay Gardens Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598 (3) and *U. S. v. Cumberland County*, (4th Cir., 1961) 296 F. 2d 264 (6).

The patently erroneous decision of the Fifth Circuit stems from a holding that trial judge abused his discretion in adopting the awards without saying so, and without a finding of plain mistake on the part of the Commissioners or the Court, as required by law before a case is reversed.

5. OPINION OF THE FIFTH CIRCUIT CASTS UNAUTHORIZED REFLECTION UPON QUALIFICATIONS OF WITNESSES FOR PETITIONERS, AND WEIGHT OF THEIR TESTIMONY.

Rule 43 states that "the statute or rule which favors the reception of the evidence governs". In this regard, the matter of qualifications of a witness is peculiarly for the trial judge, in this case, the Master. Since Rule 43 provides that the rule which favors the reception of evidence governs, Petitioners cite below the applicable Georgia law relating to opinion evidence of value and qualifications of witnesses.

> "Market value, how proved.—Direct testimony as to market value is in the nature of opinion evidence. One need not be an expert or dealer in the article, but may testify as to value, if he has had an opportunity for forming a correct opinion. (86 Ga. 693 (12 S.E. 1017).)"
>
> *Georgia Code, 1933, § 38-1709.*

> "Primarily, the question of the competency of a witness to testify is a preliminary one for the trial court.
>
> "A witness is competent to testify as to the market value of farm land, if he has had an opportunity for forming an opinion as to its value."
>
> *Central Georgia Power Company v. Cornwell, 139 Ga. 1 (1), 76 SE 387.*

In the body of the opinion, the Supreme Court of Georgia quoted Lawson on Expert and Opinion Evidence (2nd Ed. p. 469 et seq.) to the effect that farmers are *experts* as to the value of farm lands and its

products. It also adopts the rule that all specific limitations and tests as to qualifications are abandoned, and the broad test adopted that "any person having knowledge of" or "acquainted with" the values may testify. The Court states that this broad rule is "perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge, . . . whose decision will not usually be disturbed on appeal. . . . A claim to knowledge will reasonably be regarded as prima facie sufficient . . . . Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question."

A fortiori, an owner is presumed to have sufficient knowledge of his property and its value to express an opinion. See *Warren v. State*, 76 Ga. App. 243, 245, 45 SE 726.

The Georgia rule is substantially in accord with the Federal Rule as announced by this Court in *Montana Railway Co. v. Warren*, (1890) 137 U.S. 348, 11 S. Ct. 96, and in the following additional authorities.

> "Generally an owner familiar with property which he occupies and operates in a business may testify concerning its value when that issue becomes material, even though he may not be an expert as to values generally of property of that kind."
>
> *Telluride Power Co. v. Williams, 164 F. 2d 685 (5), 10th Cir., 1947.*

"An owner is competent to testify as to value of his property.

"Since an owner is competent to testify as to the value of his property, Chase v. MacDonell, 154 Okl. 165, 7 P. 2d 465, the jury was at liberty to consider the owner's valuation as well as that of the expert."

Hartford Fire Insurance Company v. J. W. Cagle, (10th Cir., 1957) 249 F. 2d 241 (8), 243.

That the witnesses were qualified is sustained by authorities which Respondent makes no attempt to distinguish. Respondent conceded this when it made no objection to their testimony, no motion to strike same, and no objection as to their qualifications in the so-called general objections to the awards. The question simply was not before the Fifth Circuit, but the opinion of that Court labors to sustain its reversal of the Trial Court by resort to unjustified criticism of the qualification of Petitioners' witnesses, and the weight of their testimony. Again, it is a case of fact-finding, pure and simple, on an appellate level.

"Neither federal District Court, nor Court of Appeals on appeal, may refuse to recognize master's findings merely because of a difference in personal persuasion or a dissatisfaction with result reached. Fed. Rules Civ. Proc. rule 53 (e) (2), 28 U.S.C.A."

Ferroline Corp. v. General Aniline & Film Corp., 207 F. 2d 912 (10) 913 (7th Cir., 1953).

6. COMMISSION WAS NOT REQUIRED IN WATSON CASE TO MAKE FINDINGS AS TO WITNESSES' OPINIONS AS TO THE CONTRIBUTION OF IMPROVEMENTS TO MARKET VALUE OF LAND AS A WHOLE. NEITHER WAS IT REQUIRED TO MAKE SEPARATE FINDINGS OF THE VALUE OF THE SEPARATE TRACTS OF LAND IN THE GAVIN CASE.

If Respondent is correct, a Commission must make explicit findings as to qualifications of witnesses, and who they believed and why they believed one witness in preference to others. But the requirement of findings does not stop here. If a witness gives the basis of his opinion, then a Commission must go further, and explicitly state what it finds with reference to such breakdown or cross examination of the witness. We are unaware of any authority which holds such, and cannot conceive that the requirement of findings has reduced Rule 53 (e) (1) (2) to such an absurdity.

At the outset, it is recalled that there were no objections to this testimony by Respondent in either of the cases.

Since the breakdown of improvements in the *Watson* case, and the separate valuation of the tracts in the Gavin property are in principle somewhat related, these points will be argued together.

We daresay that the Commissioners made separate determinations of the amounts which the improvements contributed to market value in the *Watson* case, and

separate determinations of the separate tracts in the *Gavin* case, Respondent would probably have complained of a violation of the so-called "unit" rule. See *U. S. v. City of N. Y.*, (2nd Cir., 1948) 165 F. 2d 526, where a "raw land" approach to value was condemned. However, in this case, Judge Hand observed as to the so-called unit rule as follows:

> "Indeed, we think that it is an undue simplification to extract from the books any 'Unit Rule' whatever, in the sense of general authoritative directions . . . The argument, so put, is undoubtedly a highly important caution, when the attempt is made to appraise improved land by a process of cumulation; but we question whether it has any further office than to keep before the tribunal the only relevant objective: The exchange value of the newly emerged unit."
> *Id. at* 528.

Likewise, admission of evidence as to separate tracts of the land condemned is clearly a proper approach to valuation of the whole. Judge Hand continued:

> "It is true, when an area has been subdivided into plots that the very fact that these have been made separately saleable, will ordinarily make it desirable to appraise the whole by separate valuations of each plot;"
> *Id. at* 52.

To same effect, *Cade v. U. S.* (4th Cir., 1954) where it was held:

> "It was error for trial judge, in condemnation proceeding, to strike out entire testimony of ex-

pert witness, who testified to value of land as whole after giving valuation which he had placed upon various parts, on ground that overall value to which witness had testified had been arrived at by adding together values he had placed upon various items.

"Property should be valued as a whole for purpose of assessing compensation for the taking, but this does not preclude admission of testimony showing particular elements of value for consideration by jury in arriving at overall value which they are required to find as basis of compensation, and value of a rock deposit, like value of coal mine or an oil well or a building, may properly be shown as bearing upon value of property being taken, even though measure of recovery is overall value of property."

Cade v. United States, (4th Cir., 1954) 213 F. 2d 138 (4) (7), 139.

In *Cunningham v. U. S.*, 270 F. 2d 545, the identical complaint of no findings as to the value of subtracts was made, and the Fourth Circuit disposed of such contention in the following language:

"The failure of the commissioners to find a value for each of the subtracts of tract 12 is the first ground of attack under the report. It may be that, under the circumstances of this case, we would not find fault with a report which separately valued each use area and found just compensation to be the sum of separate values. See United States v. City of New York, 2 Cir., 165 F. 2d 526, 1 A.L.R.2d 870. In the earlier appeal, however, we admonished the commissioners:

"* * * This testimony (of values of portions of the land for special purposes) was admissible as bearing on the question of valuation, even though it was required that the property be valued as a whole. Cade v. United States, 4 Cir., 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements of value together. Morton Butler Timber Co. v. United States, 6 Cir., 91 F. 2d 884; United States v. Certain Parcels of Land, 5 Cir., 149 F. 2d 81. * * *" (246 F. 2d 333.)

"It is true we were then thinking, in part, of testimony that the land contained ilmenite and had a value for mining purposes, a use inconsistent with other claimed uses. We can hardly say the commissioners failed to follow our instructions, however, when they did what they were told to do by this Court and by the District Court. In resubmitting the case, the District Court instructed the commissioners to find a single value for tract 12 as a whole.

"No one requested the courts to instruct the commissioners to find separate values for the subtracts until the landowners did so after the completed report had been considered by the District Court. No one requested the commissioners to find such values. Furthermore, the absence of separate valuations is no undue hindrance to judicial review, for, as will presently appear, the reason for the differences between the findings of the commissioners and those of the District Judge is clear."

Cunningham v. United States, 270 F. 2d 545, 548 (4th Cir., 1959).

At any rate, the Commissioners did not fall into this "trap". Separate valuations of improvements and of subtracts were neither required nor requested. Even the Fifth Circuit's opinion does not complain of these as a deficiency in findings of fact.

Findings are not required to every facet of the evidence, nor need they discuss rejected propositions or contentions of the parties. Cases from every Circuit in this Country (collected and cited pp. 14-23, Petitioners' petition for certiorari) and this Court's decision in *Interstate Circuit, Inc. v. U. S.*, 304 U.S. 55, affirm this basic rule of law. See 5 Moore's Federal Practice, pp. 2660-61.

7. FINDINGS WITH REFERENCE TO ALLEGEDLY COMPARABLE SALES EVIDENCE ARE NOT REQUIRED UNDER RULES 52 OR 53.

On page 16 of its brief, it is asserted by Respondent that "it is only in the absence of such sales (truly comparable sales) . . . that opinion evidence should be given weight in determining just compensation". Respondent cites no case to support this statement of principle and we submit there are none. Generally, truly comparable sales are the best evidence of value. Candor requires recognition, however, that no two parcels of land are alike. Whether a particular sale offers sufficient similarity to the tract being valued, whether it is sufficiently proximate in time and under similiar market conditions, and whether it was a free and voluntary sale, aside from other factors, make such

evidence no inflexible formula for the determination of market value, but renders it merely evidence to be weighed and adjusted by the factfinder, in much the same fashion that it weighs opinion and other evidence. The presumption is that the factfinder applied proper rules of law in weighing all the evidence.

(a) RESPONDENT REFUSES TO FACE THE VITAL DISTINCTION BETWEEN SIMILAR SALES INTRODUCED AS INDEPENDENT OR SUBSTANTIVE EVIDENCE OR AS THE STANDARD OF VALUE, AND SALES INTRODUCED AS A BASIS FOR THE OPINION OF ITS EXPERT WITNESSES.

It is obvious from the reading that the Commission rejected the opinion evidence of the Respondent's witnesses and the claimed comparable sales which were used to attempt to buttress these opinions. The distinction between the two methods of use of comparable sales evidence has been recognized as vital.

> "In condemnation cases evidence of sales of other properties is admissible for either one or both of two purposes: (1) to establish an actual going market for sales of like property which then becomes the best (if not the only) measure of just compensation; (2) as tangible evidence of one of the many factors leading a skilled expert to reach a conclusion on value where there is no going market. The distinction is *vital* as this Court has pointed out. 'When the effort is not to show the sale of other property * * * as a *standard* of value, but these are referred to by a witness experienced in dealing with such properties in the neighborhood and qualified to have an opinion on values,

merely, as things in his knowledge which contributed to the opinion which as an experienced man he holds, his opinion ought not to be rejected from evidence, but ought to go to the jury for their consideration if its reliability * * *,' Atlantic Coast Line R. R. v. United States, 5 Cir., 1943, 132 F. 2d 959, 963. As we more recently stated in approving this case, the 'experts must base their opinions on such information in the art that accounts for their becoming experts.' And, not surprisingly, that means that even 'a certain amount of hearsay is a necessary ingredient of the opinion * * *.' International Paper Co. v. United States, 5 Cir., 1955, 227 F. 2d 201, 208."

Dissenting Opinion of Judge Brown in U. S. v. Michoud Industrial Facilities, (5th Cir. 1963) 322 F. 2d 698, 719.

To same effect:

Atlantic Coast Line R. R. v. U. S., (5th Cir., 1943) 132 F. 2d 959, 963;

U. S. v. Johnson, (9th Cir., 1960) 285 F. 2d 35 (5) (6) (7), at 40-41;

U. S. v. 5139.5 Acres of Land (4th Cir., 1952) 200 F. 2d 659, 662.

Where the value opinion themselves were rejected, it is reasonable to conclude that the allegedly comparable sales testified to by these experts were likewise rejected.

"Findings of the trial court 'are to be construed liberally in support of a judgment or order. . . . Whenever, from facts found, other facts may be

inferred which will support the judgment, such inferences will be deemed to have been drawn.'"
5 *Moore's Federal Practice*, p. 2661.

Respondent can hardly complain of the failure to make detailed evidentiary findings as to the one comparable sale introduced in the *Lindsay* case, and the five comparable sales introduced in the *Gavin* case, particularly where it made no request for such findings or objections to the reports articulating this as an objection. Petitioners might have made this a basis for an objection but it is Petitioners' position that a specific objection calling for such a finding would be meritorious.

On page 17 of its Brief, Respondent incorrectly states that the Lindsay award exceeded by $53,990.00 the sole opinion based on comparable sales. This ignores the fact that Landowners' expert based his opinion on comparable sales, as did several of his other witnesses. It is presumptuous for Respondent to even use the term "comparable sales" in connection with Mr. Hall's testimony since the Commission obviously rejected his testimony and the purportedly comparable sales on which his opinion was based.

8. COMMISSION NOT REQUIRED TO STATE WHAT WITNESS IT RELIED UPON IN FIXING MARKET VALUE OR SEVERANCE DAMAGE.

On pages 14-15 of its Brief, Respondent summarizes the evidence as to severance damage to the Gavin tract. The Commission awarded $4,480.00. Landowners' expert testified to total severance damage of

$4,586.00, and gave his basis therefor. On page 20 of its Brief, Respondent states that the Rules do not require Masters to set out "evidentiary factfindings in infinitesimal detail". Respondent's complaint of not making specific findings as to each phase of the evidence as to severance damage of the Gavin tract is entirely inconsistent with its admission that Masters are not required to make evidentiary factfindings in minute detail.

9. THE TEST AS TO ADEQUACY OF FINDINGS IS WHETHER THEY ARE SUFFICIENTLY COMPREHENSIVE AND PERTINENT TO THE ISSUES IN THE CASE TO FORM A BASIS FOR DECISION, AND WHETHER THEY ARE CLEARLY ERRONEOUS, AND THIS IS FOR THE TRIAL COURT TO DETERMINE IN THE FIRST INSTANCE.

Glossing over the innumerable decisions to the effect stated urged by Petitioners and indifferently ignoring the numerous authorities supporting Petitioners' position, Respondent again assumes the role of a favored litigant and announces a new rule to suit its reasoning as follows:

> "The guideline as to the adequacy of findings is whether they provide a sufficiently informative explanation of the premises upon which the commission acted and the inferences it drew to enable the reviewing court to conduct an intelligent examination of the validity of the commission's conclusions."

We have found no decision supporting this loose language and we submit there are none.

The classic statement of the test has been:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence."
>
> *Schilling et al. v. Schwitzer-Cummins Co., 142 F. 2d 82, 84 (CCA D.C., 1944).*

On page 15 of its Brief, Respondent asserts that the District Court was not given "the slightest clue as to why the Commissioners selected the figures they did instead of others for which there was supporting evidence". The District Court did not find himself so uninformed. Why does any factfinder find a verdict different from other figures within the range of competent evidence? It is simply a matter of credibility, and Respondent's argument closes its eyes to that part of Rule 52 which states "and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses".

Next, it is asserted by Respondent on page 21 of its brief that "Petitioners labor under the misapprehension that a condemnation commission is merely a group of three masters". This accusation is not supported by fact, logic or law. The import of Rules 71A (h), 53 and 52 are clear for the reading. Rule 71A (h) constitutes the Commission a master or factfinder

under Rule 53 to determine just compensation. All other issues are for the District Court. There is nothing unique in Rule 71A (h) as contended by Respondent.

10. HATAHLEY v. U. S., 351 U.S. 173, AND DALEHITE v. U. S., 346 U.S. 15, SUPPORT NEITHER THE DECISION OF THE FIFTH CIRCUIT NOR RESPONDENT'S ARGUMENT.

The *Kelley* case, *supra,* has already been distinguished (Petitioners' Brief, pp. 26-27).

The *Hatahley* case distinguishes itself.

> "But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to *allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros.* There can be no apportionment of the award among the Petitioners *unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner.* These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard." (Emphasis ours.)
>
> *Hatahley v. United States, (1956) 76 S. Ct. 745, 752, 351 U.S. 181.*

Respondent finds no support for its position in *Dalehite*. In that case, this Court merely held that as a matter of law no cause of action lay under the Federal Tort Claims Act, and the so-called findings of fact of negligence were held not binding as determinative of the case, because they were in fact conclusions of law without legal basis. Judge Hutcheson's opinion in the case below, 197 F. 2d 771, at 782, characterized the findings as "profuse, prolific and sweeping". Judge Rives' opinion at 774 quotes the District Court as stating:

> "'Counsel for Plaintiffs and Defendant have, at the Court's request, indicated what Findings of Fact they think should be made, but many of such requests for Findings are for Findings on *evidence* as distinguished from Findings on the *issues* as made by the pleadings. Such requests are hereinafter disposed of. An effort has been made to find the facts only on the issues, and thus bring the case within as small compass as possible.'" (Emphasis ours.)
>
> *Texas City Disaster Litigation, (5th Cir., 1952) 197 F. 2d 771, 774.*

The point is that the findings were "profuse, prolific and sweeping" rather than "of fact" and "concise". Respondent is here complaining *not* of profuseness, but of claimed inadequacies or over-conciseness. It would indeed be findings on evidence instead of fact on the issues if Respondent's position is accepted.

11. RESPONDENT CONCEDES THAT RULE 53 (e) (2) REQUIRES OBJECTIONS IN ORDER TO PRESERVE MATTERS FOR REVIEW.

On pages 21 et seq., Respondent contends that it could make only general objections to the Commission's report in the District Court. Respondent's failure to file specific objections articulating particular inadequacies in the reports suggests that its present contentions are afterthoughts after it took its chances on an appeal and lost. Nothing, absolutely nothing, prevented Respondent from filing specific objections complaining that the reports were inadequate because:

(a) The reports fail to set forth the qualifications of the witnesses; or

(b) The reports fail to state what witnesses and what evidence the Commission credited and discredited, and ultimately relied on in arriving at its award; or

(c) The reports fail to state whether the allegedly comparable sales introduced into evidence were in fact truly comparable so as to be a guide in the determination of fair market value; or

(d) The reports fail to state why the Commissioners agreed upon the sums awarded rather than other sums within the range of the evidence; or

(e) The reports fail to set forth the method by which the Commission arrived at the awards agreed upon; or

(f) The reports failed to state why they discredited the Respondent's expert witnesses.

Respondent did file such specific objections in *Gill v. U. S.*, (9th Cir., 1962) 313 F. 2d 416, and *U. S. v. Tulare Co.*, 187 F. Supp. 728, but such specific objections are significant by their absence in the instant cases.

The suggestion that *U. S. v. Lewis*, (9th Cir., 1962) 308 F. 2d 453 (2), at 456 is an "intimation to the contrary" of Respondent's position is playing with words. The Ninth Circuit in that case categorically rejected Respondent's present identical contentions in that case. See Petitioners' Brief, p. 38.

The argument advanced in this Section of Respondent's Brief not only misses the point of Petitioners' argument in the second section of their Brief, it has no appeal to reason, logic or authority and finds no support in the Rules. Finally, it is bottomed on a misunderstanding of the meaning of the word "merits". Merits is defined by the authorities to relate the matters of substance as distinguished from matters of form, practice, procedure or jurisdiction. Finally, it is inaccurate because exceptions as to the *merits* of the cases were made in the exceptions and objections filed in the District Court. See Exceptions numbered 3, 4, and 5, (R. 50-52, 52-54, 100-101). These objections to the merits were abandoned on appeal when Respondent specified its points. (R. 108-109.)

The position of Petitioners is plainly stated on page 39 of our Brief and we will not labor the point. How-

ever, it is indeed noteworthy that Respondent concedes that Rule 53 (e) (2) *requires* objections to be filed in order to preserve questions for review. (Respondent's Brief, p. 22.) *Where Respondent's argument fails to come to grips with the real issue is whether these objections may be general or must be specific.* A critic should point to the deficiency complained of and advise the Court specifically what he wants, and make known or articulate his grounds of objection. Otherwise, he is deemed to have waived the objection. Of course one must object for a specific purpose, and where there is no objection to the end result, complaints as to procedural matters present only academic questions.

> "Where neither party to condemnation proceeding excepted to Commission's finding as to amount which would constitute just compensation, neither party could raise question concerning form of or contents of report."
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> *U. S. v. Land in Tulare Co., 187 F. Supp. 728 (11).*

The extreme hypothetical case set forth on pages 22-23 of Respondent's Brief illustrates merely that the specific objection that no hearing was had as required by Rule 53 would be sufficient to set aside the award for non-compliance with the Rules and due process. Such an objection is specific, however, and points to a defect which obviously is ground to set aside the award.

12. A PARTY MAY COMPLAIN OF PROCEDURAL ERRORS, BUT A FAILURE TO COMPLAIN OF PROCEDURAL ERRORS IS A WAIVER THEREOF.

Petitioners agree that a party may complain of procedural errors that infect a judgment. The failure to complain is a waiver thereof. It is the failure to complain by filing specific objections to the Reports at the proper time that bars the Respondent in this case.

The accusation that Petitioners' contention that Respondent's failure to challenge the excessiveness of the awards in its designation of points on appeal rendered its vague and general objections ineffectual to present a question for review is patently frivolous seems misdirected. It was not frivolous to Judge Hall in *U. S. v. Tulare Co., supra,* nor is it deserving of such a bit of namecalling here. Of course, a Court of Appeals has the inherent power of its own motion to reverse a judgment which is inherently wrong, a gross miscarriage of justice, or the product of prejudice or bias. But such power is reserved for such cases and is not exercised in such cases. See *Stephens v. U. S.*, (5th Cir.; 1956) 235 F. 2d 467 (2) 470-471. When a Court of Appeals uses this inherent power to reverse judgments which are not of the type contemplated, it abandons its judicial role, and commits error. That is what the Fifth Circuit did in this case. This is no frivolous matter, at least to Petitioners. Neither was the lax procedure followed by Respondent in these instant cases deemed a frivolous matter to Ninth Circuit Court of Appeals when it stated:

"Neither individually nor collectively do these incidents in the course of the trial furnish any basis for the charge of bias and prejudice leveled at the trial court for the first time on appeal. Apropos of the situation here is the statement of the Court in Adams Dairy Co. v. St. Louis Dairy Co., (8th Cir.) 260 F. 2d 46, 55:

> "'The zeal with which counsel for appellant presents this contention on appeal contrasts sharply with their failure to demonstrate any concern at the time the challenged conduct was in progress. A painstaking and assiduous examination of the voluminous record reveals that not a single objection was made or exception taken to the conduct of the judge, said to be so prejudiced as to constitute denial of due process. Under Rule 46 of the Federal Rules of Civil Procedure, 28 U.S.C.A., a party is required to make known his objection and grounds thereof. Substance inheres in this requirement and observance thereof is essential to the administration of the business of the courts.'"

United States v. Johnson, (9th Cir., 1961) 285 F. 2d 35, 42, 43.

CONCLUSION.

It is manifest from reading the opinion of the Fifth Circuit that it stems from the particular judges' concept of prior strictures against the use of a Commission in condemnation cases. (R. 114-115.) The undertones of the opinion exude almost a contempt for a Commission. It is claimed in the opinion of the Fifth Circuit that at a jury trial, the trial judge properly rules on the ad-

missibility of evidence and then narrows the issue by appropriate charges to the jury. There are numerous decisions to the effect that it is presumed that only proper evidence was considered by the Commission in arriving at its awards. Insofar as knowledge of the law is concerned, the reports reflect proper knowledge of the applicable law and the instructions to the Commission by the trial judge summarize the law governing the Commission. The trial judge made adequate provision for ruling on the admissibility of the testimony and stated that the Chairman of the Commission was an experienced attorney (R. 25). Under such circumstances, the claimed distinction between a jury and a Commission is one without a difference. The award of a Commission is generally treated the same as the verdict of a common law jury. See *U. S. v. Certain Lands in Jackson Co.*, 48 F. Supp. 591 (1) (2) (3) 592. To same effect: *U. S. v. Land in Wayne Co.*, 40 F. Supp. 792 (2); *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 30 S. Ct. 581, 586; *Shoemaker v. U. S.*, 147 U.S. 282, 13 S. Ct. 361; *St. Bernard Cypress Co. v. U. S.*, (5th Cir.) 65 F. 2d 711; *Guste v. U. S.*, (5th Cir.) 55 F. 2d 115, 117; *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 30 S. Ct. 581, 586; *Shoemaker v. U. S.*, 147 U.S. 282, 13 S. Ct. 361; *St. Bernard Cypress County v. U. S.*, (5th Cir.) 65 F. 2d 711; *Guste v. U. S.*, (5th Cir.) 55 F. 2d 115, 117.

In the *Wayne County* case, *supra*, it was stated:

> "These cases state the law. To what end should a Court undertake to weigh evidence, and to make a finding as to value. It cannot enter judgment based upon its independent finding but must re-

submit the matter to a Commission if it sets aside the award. Should this process continue until the Commission reaches a result that accords with the view of the Court? To do so would strip the Commission of their authority to determine the amount of compensation to be paid to the property owners in condemnation cases. It would vest the Court with authority not granted by the statute, and not consonant with our fundamental law.

"The function of the reviewing Court is to look for 'plain mistake whether of law or fact, or plain partiality or corruption.'" *Guste* case, *supra*.

U. S. v. Wayne County, 40 Supp. 792.

Whether a litigant, or a Court likes or dislikes the Rules of Civil Procedure is no reason for upsetting every award of a Commission that comes before that Court. If Respondent had taken exception to the trial court's reference to the cases to a Commission and the Fifth Circuit had held that it abused its discretion in this respect, Petitioners would have no cause for complaint. The law would have run its course, and the integrity of the Rules maintained. Not so in the instant case. Such collateral attacks upon the integrity of awards as the opinion of the Fifth Circuit typifies we pray will not be sanctioned by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1963, I served copies of the foregoing Reply Brief for the Petitioners to the United States Supreme Court on the United States of America, Respondent, as follows:

By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,
Assistant Attorney General,
Washington, D. C.,

Messrs. Roger P. Marquis and Hugh Nugent,
Attorneys, Department of Justice,
Washington, D. C.,

Mr. Floyd M. Burford,
United States Attorney,
Macon, Georgia

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

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